TANG KEE CHIE v. PUBLIC PROSECUTOR

[A. Cr. J. (Chong Siew Fai J.) November 10, 1984]

[Sibu – Criminal Appeal No. 25 of 1982]

Trade Description – False trade description – Charges under the Trade Description Act, 1972, ss. 3(1)(a) & (b) & 18 – Essential ingredient of offence not proved – Whether convictions sustainable.

Criminal Law and Procedure – Accused convicted on own pleas – Whether there can be an appeal against conviction.

Criminal Law and Procedure – Sentence – Whether sentences manifestly excessive – Sentencing policy – Sentence must only be for the offence for which accused is convicted.

The accused was charged with two offences under the Trade Descriptions Act 1972 ("the Act"). The first offence was for applying a false trade description which is an offence under section 3(1)(a) of the Act and punishable under section 18 of the same Act. The second offence was for offering to supply packets of food seasoning material which had a false trade description which is an offence under section 3(1)(b) of the Act and punishable under section 18 of the same Act.

The accused was convicted on his own pleas of guilty and was sentenced to 6 months' imprisonment and $1000 fine in default 2 months' imprisonment for the first offence and $1000 fine in default 2 months' imprisonment for the second offence. He appealed against both the convictions and sentences.

Held, allowing the appeal in part: (1) there can be a right of appeal even when the accused was convicted on his own plea of guilty. Even if there is no right of appeal this court as the appellate court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice had occasioned;

(2) it is important that sentence is passed only for the offence of which an accused person is convicted and not on the basis of an offence or offences apparently disclosed by prosecution evidence or offence or offences which he might have committed and with which he is not charged;

(3) the appeal against the conviction of the first offence charged had no merit and should be dismissed;

(4) in the circumstances of the present case, the sentences for the first offence were manifestly excessive. The sentence of imprisonment should be set aside. The fine should be increased by $1,500 from $1000 to $2,500;

(5) as for the second charge, the essential ingredient of the offence namely the offer to supply the food-seasoning material, was lacking and on the facts as disclosed the court should not have convicted the appellant. The conviction and sentence should be set aside.

Cases referred to:

(1) *Heng Kim Khoon* v. *Public Prosecutor* [1972] 1 M.L.J. 30.

(2) *Subramaniam & Anor.* v. *Public Prosecutor* [1976] 1 M.L.J. 76.

(3) *Wong Siak Fon* v. *Public Prosecutor* [1972] 1 M.L.J. 203.

(4) *Manokaran & Anor.* v. *Public Prosecutor* [1979] 1 M.L.J. 262.

(5) *Lee Yu Fah* v. *Public Prosecutor* [1937] M.L.J. 179.

(6) *Public Prosecutor* v. *Paghutheen* [1969] 1 M.L.J. 25.

(7) *R.* v. *Foo* [1976] Crim. L.R. 456.

(8) *R.* v. *Chadderton* (1980) 2 Cr. App. R. (S) 272.

(9) *R.* v. *Fisher* [1982] Crim L.R. 191.

(10) *Syarikat Chip Seng Trading Sdn. Bhd. & Anor.* v. *Public Prosecutor* [1979] 2 M.L.J. 82.

(11) *R.* v. *Edelson* [1978] Crim. L.R. 759.

CRIMINAL APPEAL.

David Tiong for the appellant.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J.: The appellant was charged with two offences under the Trade Descriptions Act, 1972 as follows:-

"Charge I:

That you on the 17th day of July, 1981 at about 4.00 p.m. at premises No. 19B Belian Lane, off Tiong Hua Road, Sibu, Third Division, in the State of Sarawak, in the course of business, did apply a false Trade Description, namely, 'AJI-NO-MOTO' on 97 x 300 gms. packets of food seasoning, whereas in actual fact the said food seasoning were manufactured by you in your premises and were not the product of Ajinomoto (Malaysia) Sendirian Berhad, Kuala Lumpur and that you have hereby committed an offence under section 3(1)(a) of the Trade Description Act, 1972 and punishable under section 18 of the same Act. (LAWS OF MALAYSIA ACT NO. 87).

Charge II:

That you on the 17th day of July, 1981 at about 4.00 p.m. at premises No. 19B Belian Lane, off Tiong Hua Road, Sibu, Third Division, in the State of Sarawak, in the course of business, did offer to supply 97 x 300 gms. packets of food seasoning to which a false Trade Description, namely 'AJI-NO-MOTO' were applied, whereas in actual fact the said food seasoning were not the product of Ajinomoto (Malaysia) Sendirian Berhad, Kuala Lumpur and that you have committed an offence under section 3(1)(b) of the Trade Description Act, 1972 and punishable under section 18 of the same Act. (LAWS OF MALAYSIA ACT NO. 87)."

He was convicted on his own pleas of guilty and was sentenced to 6 months' imprisonment and $1,000/- fine, in default 2 months' imprisonment

on the first offence, and $1,000/- fine in default 2 months' imprisonment on the second offence.

Against the convictions and sentences he appeals.

So far as relevant to this appeal the facts may be summarised as follows. On the day in question the 97 packets of food seasoning bearing trade mark 'Ajinomoto' and some other articles including two sales receipt books were found and seized from the appellant's premises by a party of enforcement officers from the Ministry of Trade and Industry. Samples of some of the articles seized were sent for examination by chemist and were found to be different from the genuine products of Ajinomoto (M) Sdn. Berhad. It was admitted that they were imitations. The two sales receipt books were under the name of Hua Hing (Pte) Company of 19B, Belian Lane, Tiong Hua Road, Sibu. However, nothing is known of the connection between this company and the appellant. Neither is there anything suggesting any relation between the sales receipt books and the 97 packets in question.

On behalf of the appellant it was contended that only one of the two offences under section 3(1) of the Trade Descriptions Act was preferable against an individual and that it was wrong to charge and convict the appellant on both offences. In my view the point is devoid of merit.

Section 3(1) of the Trade Descriptions Act, 1972 merely creates the offences. It does not enact that a person can only be guilty of one of the two offences. If the facts so justify a person can be convicted of both offences thereunder.

However, that does not conclude the matter. I shall now consider the two offences of which the appellant was convicted. In my view, the appellant was properly convicted on the first charge of applying false trade description, namely "Aji-No-Moto" on 97 packets of food seasoning. The appeal against conviction of the first offence charged has no merit and is dismissed.

As to the second charge of offering to supply the 97 packets of the food-seasoning material to which the false trade description was applied, with respect, I am of the view that the facts given by the prosecution do not disclose that the offence alleged had been committed. The Trade Descriptions Act, 1972 ("the Act") is a penal statute and has to be construed strictly. It must also be borne in mind that the subject-matter of the charge is the 97 packets of the food-seasoning material. One of the essential elements of the alleged offence under section 3(1)(b) of the Act is to 'offer to supply'. The facts as given by the prosecution and admitted by the appellant who was unrepresented at the trial in the lower court do not establish or show that the appellant had offered to supply the 97 packets bearing the false trade description or any thereof. Briefly, the facts show that on the day in question the enforcement party of the Ministry of Trade and Industry, Sibu, made a search in the appellant's premises. Amongst other things, 97 packets of the food-seasoning material bearing the false trade description of 'Ajinomoto' were found and seized. Subsequently, chemical analysis established that the substances were imitations. There is nothing suggesting that the appellant had offered to supply the 97 packets. Nor did the prosecution in outlining the facts show or suggest that the appellant had exposed the 97 packets for supply or having them in his possession for supply thereby attracting the presumption of offer under section 8 of the Act. In the circumstance the essential ingredient constituing the alleged offence, namely, offer to supply the 97 packets of food-seasoning material, is lacking and on the facts as disclosed the court should not, therefore, have convicted the appellant on the charge as it stood.

Learned counsel for the prosecution, obviously with section 305 of the Criminal Procedure Code and/or section 50(2) of the Courts of Judicature Act, 1964 in mind, submitted that since the appellant had pleaded guilty and was convicted on such plea, there could be no appeal against conviction. I need only refer to the following cases to illustrate that convictions were set aside where the accused persons were convicted on their own plea of guilty. *Heng Kim Khoon* v. *Public Prosecutor*[1] *Subramaniam & Anor.* v. *Public Prosecutor.*[2] If the facts disclosed in a case show the absence of an essential ingredient constituting the alleged offence such that no court would have convicted the accused, the conviction and sentence will be set aside. Even if there is no right of appeal, this court as the appellate court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice had occasioned. *Wong Siak Fon* v. *Public Prosecutor*[3] and cases cited therein; *Manokaran & Anor.* v. *Public Prosecutor*[4] *Lee Yu Fah* v. *Public Prosecutor*[5] applied in *Public Prosecutor* v. *Paghutheen*[6].

For the above reasons, the conviction and the sentence on the second charge are set aside. The fine, if paid, is to be refunded.

I shall now deal with the appeal against sentence imposed upon conviction of the first offence. The appellant was sentenced to 6 months' imprisonment and $1,000/- fine in default 2 months' imprisonment.

It is important that sentence is passed only for the offence of which an accused person is convicted and not on the basis of an offence or offences apparently disclosed by prosecution evidence or offence or offences which he might committed and of which he is not charged. *R.* v. *Foo*[7]; *R.* v. *Chadderton*[8]; *R.* v. *Fisher.*[9] In the instant case the learned trial Magistrate in passing sentence was influenced by matters unrelated to the offence of which the appellant was convicted. This is shown by his remarks about the appellant being in possession of 6 big bags of crystalline powder and a large quantity of plastic bags, the supplies of products to retailers, the possible harmful effect to the health of consumers resulting from the supplies. These are matters unconnected or unrelated to the offence of applying false trade description to the 97 packets of which the appellant was convicted. The learned trial Magistrate also said: "The facts show accused deliberately applied false trade description in order to make profit in the course of his business . . . . . " With respect, the application of false trade description *per se* does not attract profit, it is the sale of products to which false trade description had been applied that will make profit, respecting which the second charge is relevant but the conviction thereunder has been quashed.

The appellant was a first offender under the Act and he had shown remorse. Whilst it is true that the Act was intended to protect the public against unscrupulous and irresponsible traders, the appellant in the instant case had not sold any of the 97 imitation packages thereby unjustly enriching himself. The facts from the prosecution are suggestive of some previous dealings of imitation goods but having regard to the charge, these facts are irrelevant to the case for the purpose of sentencing. In *Syarikat Chip Seng Trading Sdn. Bhd. & Anor.* v. *Public Prosecutor,*[10] a fine of $4,000/- imposed on the manager of the company who was convicted of the offence of applying false description to 20,000 exercise books was upheld on appeal. In *R.* v. *Edelson*[11] the defendant aged 30 years and a first offender pleaded guilty to 10 counts under the Trade Descriptions Act, 1968 (English). These counts were samples showing the pattern of the defendant's offences over a period of 12 months and the offences fell into 3 different groups. He was sentenced to a total of 12 months' imprisonment, fined £500/- on each count and was also ordered to pay costs. On appeal, it was held that although the offences were bad of their kind, having regard to the defendant's age and record an immediate prison sentence was not appropriate. In all the circumstances of the instant case, I am of the view that sentences in the forms of both imprisonment and a fine are manifestly excessive. I would consider a sentence of increased fine alone reasonable and adequate punishment for the appellant. The sentence of imprisonment is set aside but the fine is increased by $1,500/- from $1,000/- to $2,500/-. In default, 3 months' imprisonment.

To the above extent the appeal is allowed.

As to the exhibits,

(a) Exhs. P1, P2, P3, P4, P7, P8, P9, P10, P11, P13, P14, P15, P16, P17, P18, P19 are to be handed to the Ministry of Trade and Industry for disposal.

(b) Exh. P5 (sealing machine) and Exh. P6 (2 weighing machines), Exh. P12 (4 packets of genuine Ajinomoto) are to be handed to the said Ministry for return to their true owner or owners, Exhs. P5 and P6 not having been shown to have been used in the commission of the offence in question.

(c) Exhs. P20 (chemist report) and P21 (seizure list) are to be kept by the Court Registry.

Order accordingly.

Solicitors: *David Tiong.*